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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
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6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF YAVAPAI**

8 **STATE OF ARIZONA,**

9 Plaintiff,

10 vs.

11 **STEVEN CARROLL DEMOCKER,**

12 Defendant.

CAUSE NO. P1300CR201001325

**REPLY IN SUPPORT OF
STATE'S MOTION FOR
ADMISSIBLE EVIDENCE**

Assigned to Hon. Warren R. Darrow
Division PTB

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15 The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and
16 her deputy undersigned hereby submits its Reply in Support of Motion for Admissible Evidence.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 Defendant's reliance upon Rule 16.1(d), Arizona Rules of Criminal Procedure and the
19 doctrine of collateral estoppel are without merit. As explained at length in the State's Motion for
20 Admissible Evidence, these principles do not apply to this case because this case is a separate and
21 new case from the previous case in which the rulings were made.

22
23 *State v Whelan*, 208 Ariz. 168, 91 P.3d 1011, (2004) held that "Rule 16.1(d), like the law of
24 the case doctrine, is procedural and applies to setting of the *same* case. As Rule 16.1(d) expressly
25 provides, '[t]his rule shall govern the procedure to be followed in cases between *arraignment and*
26 *trial.*'" Emphasis added by the *Whelan* court at page 171.

1 The question before the *Whelan* court,

2 “is not whether the law of the case doctrine or Rule 16.1(d) precludes reconsideration but
3 whether the principles of res judicata and more specifically, the subsidiary doctrine of
4 *collateral estoppel* (or “issue preclusion”) precludes the trial court from considering afresh,
in a subsequent proceeding, the suppression order entered in the earlier proceeding.

5 *Whelan* at page 171.

6 *Whelan* unequivocally stated this issue does not implicate Rule 16.1(d) or the doctrine of the
7 law of the case. “The law of the case concerns the practice of refusing to open questions previously
8 decided in the *same* case by the same court or a higher court. *Davis v Davis*, 195 Ariz. 158, 162, 985
9 P.2d 950, 952 (App. 1999). The emphasis on “same case” was placed by the *Whelan* court. The
10 *Whelan* court concluded the law of collateral estoppel precludes the trial court from considering
11 anew in a subsequent proceeding, an order entered in an earlier proceeding.

12 The *Whelan* court, citing from *State v Jimenez*, 130 Ariz. 138, 140, 634 P.2d 950, 952 (1981)
13 noted, “[t]he traditional elements of collateral estoppel are: [1] the issue sought to be re-litigated
14 must be precisely the same as the issue in the previous litigation; [2] a final decision on the issue
15 must have been necessary for the judgment in the prior litigation; [and][3] there must be mutuality of
16 parties.”

17 Element one’s “precisely the same” test cannot be met in this case. The numerous rulings in
18 CR20081339 are not precisely the same in Case #3 as in case #1. The difference in the type and
19 number of charges contained in two separate indictments are precisely not the same. It would be a
20 mistake of law to apply the law of the case and Rule 16.1(d) in this analysis.

21 Case #1 was a First degree murder and Armed Burglary case. Pretrial rulings in case #1
22 resulted in the preclusion of the State’s evidence mainly based upon “alleged” late disclosure. Under
23 element one, the issues at hand are not “precisely the same” as case #1 because of the additional 8
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1 charges in a separate case, the precluded evidence can no longer be claimed to be "late" and the
2 State, at defendant's recommendation, was ordered by this court to dismiss case #1.

3 Under element two of the collateral estoppel analysis, the pretrial rulings in case #1 were not
4 final decisions necessary for the judgment in that litigation". *Jimenez*, supra at 150. This is because
5 the rulings were interlocutory and not final orders. *State v Rodriguez*, 126 Ariz. 28, 30, 612 P.2d
6 484, 486 (1980) equated a motion *in limine* with a motion to suppress under Rule 16, Ariz. R. Crim.
7 P. In *Rodriguez*, the motion was meant to preclude the State from introducing the defendant's
8 juvenile record. The orders in case #1 precluding the State's evidence based upon a finding they
9 were late disclosed equates to a motion to suppress. According to Black's 8th edition an
10 interlocutory appeal is an appeal that occurs before the trial court's final ruling on the entire case. In
11 a mistrial, there are no final decisions on the merits entered in for collateral estoppel to apply.
12
13 *Garcia v. General Motors Corp.*, 195 Ariz. 510, 514, 990 P.2d 1069, 1073 (1999).

14 If collateral estoppel does apply to the facts in this case, then the same analysis can be made
15 under the good cause exception in Rule 16.1(d). Good cause exceptions that apply to this analysis
16 include: 1) all rulings in case #1 dealt with the charges of First Degree Murder and Armed Burglary;
17 2) case #3 contains 7 additional felonies and 1 misdemeanor charged by separate indictment; 3) trial
18 judge #1 precluded the majority of the State's evidence based primarily on untimely disclosure after
19 the court imposed an arbitrary discovery cut-off date in July, 2009 for a trial scheduled to start in
20 June, 2010; 4) the disclosure cut-off date in case #3, by stipulation of the parties and order of trial
21 judge #2 is August 8, 2011; 5) trial judge #1 ruled certain witnesses could not to be called to testify
22 who are now material witnesses in case #3 pertaining to the hiding of the golf club cover,
23 anonymous email, voice in the vent, Hartford Insurance monies and forgery charges.
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1 *State v King*, 180 Ariz. 268, 883 P.2d 1024, (1984) supports the State's case if this court
2 decides the law of the case and Rule 16.1(d) apply. In *King*, the first trial judge barred the
3 introduction of testimony under Rule 702, Ariz. R. Crim. P. Trial judge #2 overruled this decision
4 pursuant to Rule 16.1(d), Ariz. R. Crim. P. utilizing the "good cause" exception. The singular good
5 cause exception in *King* was a finding by trial judge #2 that the testimony was admissible under Rule
6 701. In other words, the factual testimony was exactly the same except the testimony was admitted
7 under a different rule of criminal procedure. *King* is distinguished from the instant case by the fact
8 that the overruled decision occurred in the *same* case, making the analysis under procedural Rule
9 16.1(d) applicable. *King* affirmed the good cause exception by stating the court's discretion to
10 reconsider an earlier ruling is reflected in Rule 16.1(d). *King*, quoting *Love v Farmers Ins. Group*
11 121 Ariz. 71, 73, 588 P.2d 364, 366 (App. 1978) agreed that "a court does not lack the power to
12 change a ruling simply because it ruled on the question at an earlier stage."
13

14 The analysis of the *Whelan* decision would be incomplete without discussing Arizona's
15 adopted exception to the collateral estoppel doctrine under The Restatement (Second) Judgments,
16 section 28(2)(b). *Whelan* at 172, supra.

17 The Restatement (Second) of Judgments, section 28(2)(b) provides:

18 "where an issue is actually litigated and determined by a valid and final judgment and the
19 determination is essential to the judgment, relitigation of the issue in a subsequent action
20 between the parties is not precluded if: *a new determination is warranted in order to take*
21 *account of an intervening change in the applicable legal context.*"

22 Emphasis added.

23 The intervening change in the applicable legal context are additional facts in case #3 that
24 were not present at the beginning of case #1. These intervening facts resulted in 7 additional felonies
25 and 1 misdemeanor offense occurring after the defendant was arrested, indicted and placed in
26 custody on the first degree murder charge in case #1. The intervening change in the applicable legal

1 context are the facts that are inextricably intertwined with the murder of Carol Kennedy but arose
2 during the pendency of the first case. The intervening change in the legal context in case #3 allows
3 for a re-determination of the rulings in case #1 on its own grounds. The section 28(2)(b) exception to
4 the collateral estoppel doctrine has been expressly followed in Arizona in *Irby Construction Co. v.*
5 *Arizona Dept. of Revenue*, 184 Ariz. 105, 109, 907 P.2d 74, 78 (App. 1995). *Irby* stated that “a new
6 determination” is warranted.
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8 The dissent in *Whelan* relied upon *State v Nahee*, 155 Ariz. 115, 745 P.2d 173. The majority
9 distinguished *Nahee* noting the order at issue in that case was a dismissal and not an interlocutory
10 order; secondly there was **no intervening change in facts** or law; and thirdly, the dissent
11 acknowledges that the brief reference to law of the case in *Nahee* appears to be dicta. *Whelan* at 174,
12 supra.
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14 Defendant’s response complains that the State has not provided the particular e-mails that it
15 intends to introduce. This is inaccurate as the State has filed its List of Exhibits identifying all
16 evidence it seeks to admit at this time. In addressing the Rydzewski e-mail, Defendant noted that
17 part of the Court’s prior ruling noted that the e-mail was “too remote.” This is completely wrong.
18 The Rydzewski e-mail was sent by Defendant on July 2, 2008 hours before he murdered his ex-wife.
19 It deals with a joint account held by the Defendant and his ex-wife and demonstrates a clear
20 animosity. In addition, it supports the financial motive that Defendant had for killing his ex-wife.
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22 Regarding the Sorenson testing of Defendant’s bicycle, the Court’s Order concluded that the
23 seat of the bicycle was not suitable for retesting. The Court, however, failed to consider that other
24 areas of the bicycle remain suitable for retesting. Accordingly, good cause exists to revisit this
25 ruling.
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1 If the Court, however, determines that Rule 16.1(d) does apply to the present case, the State
2 urges the Court to revisit its prior rulings pursuant to the good cause exception.

3 **RESPECTFULLY SUBMITTED** this 19 day of August, 2011.

4 **Sheila Sullivan Polk**
5 **YAVAPAI COUNTY ATTORNEY**

6
7 By: Steven A. Young
8 **Steven A. Young**
9 Deputy County Attorney

10 **COPY** of the foregoing **Emailed** this
11 19 day of August, 2011, to:

12 Honorable Warren R. Darrow
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